IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

VINCENT T. M.,

Plaintiff,

v.

Civil Action No.
5:21-CV-1168 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LAW OFFICES OF
KENNETH HILLER, PLLC
6000 N. Bailey Ave, Suite 1A
Amherst, NY 14226

JUSTIN M. GOLDSTEIN, ESQ.
KENNETH R. HILLER, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
OFFICE OF GENERAL COUNSEL
6401 Security Boulevard
Baltimore, MD 21235

NATASHA OELTJEN, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.[1] Oral argument was heard in connection with those motions on October 25, 2022, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles
U.S. Magistrate Judge

Dated: October 31, 2022
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
----------x
VINCENT THOMAS M.,

Plaintiff,

vs. 5:21-CV-1168

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
----------x

Transcript of a **Decision** held during a Telephone Conference on October 25, 2022, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and all counsel present by telephone.)

THE COURT: Let me begin by commending counsel for excellent and spirited presentations. I found this case to be extremely interesting and I've enjoyed working with you.

Plaintiff has challenged a determination of the Commissioner of Social Security finding that he was not disabled at the relevant times and therefore ineligible for the Title II benefits which he sought. His challenge is brought under 42 United States Code Section 405(g).

The background is as follows: Plaintiff was born in July of 1964 and is currently 58 years old. He was 55 at the alleged onset of his disability in September 2019. He stands 5 foot 10 inches in height and weighs approximately 195 pounds. Plaintiff lives in Liverpool in a house with his wife. They have three children all aged 20, apparently triplets, two, at least two are away in college most of the time. Plaintiff earned a bachelor's degree from LeMoyne College in 1986, a master's degree in school psychology in 1992, and a master's degree in social work in 1995 approximately, he wasn't sure of the exact date. He has a driver's license and reports no problems driving.

Plaintiff has worked in various social work and counseling capacities over the years. He worked as a school social worker at the Fulton City School District from

August 1 -- August of 2001 to December of 2012. He worked as a school mental health counselor from January of 2013 to September of 2019. He worked for a short period for the State University of New York at Oswego and also at Tompkins County Community College, or TC-3. He apparently, according to AT, administrative transcript 462, left his last regular job in March of 2020. He has also, since January of 1994, had a private consulting business as a counselor and it continues on, although on a more limited basis than prior to his alleged disability.

Mentally, plaintiff suffers from depression, it has also been referred to as major depressive disorder, and anxiety. He also claims a learning disability but there doesn't seem to be any evidence to support that diagnosis. Plaintiff was hospitalized for three days for depression in 2015 in Upstate Medical Center but since then has had no psychiatric hospitalization.

Plaintiff also claims to suffer from a foot drop of his right foot and history of asthma. In 2006, he underwent surgery to address hammertoes and to loosen a tight tendon that he claims resulted in his drop foot. He claims it causes falls two to three times per year. Plaintiff's primary physician is the Family Practice Associates, with Dr. Mark VanHusen being his primary care provider there. He also obtains services from Psychiatric Consultants of Central

New York where he sees Doctor of Nurse Practitioner, or DNP, Bambi Carkey every other week approximately. Dr. Carkey has seen the plaintiff since September of 2019. The last record of treatment from Dr. Carkey in the administrative transcript is from February 17, 2021.

In terms of activities of daily living, plaintiff is able to dress, groom, bathe, cook, clean, do laundry, shop, drive, socialize with family and friends, cycle, ski, SCUBA, kayak, he watches television, he plays sports, he goes to the gym approximately three times per week, he goes to family vacations including to summer vacations in the Adirondacks, he walks with friends and he works or volunteers at a food bank.

Procedurally, plaintiff applied for Title II benefits on October 31, 2019, alleging an onset of disability date of September 5, 2019. In his function report, he claimed disability based on depression and an anxiety disorder and a learning disability. A hearing was conducted on October 28, 2020 by Administrative Law Judge Elizabeth Koennecke to address plaintiff's application for benefits. A supplemental hearing was conducted on April -- I'm going to say 11 but I'm having a hard time reading my notes, 2021 with a vocational expert. On April 19, 2021, Administrative Law Judge Koennecke issued a decision unfavorable to the plaintiff. That became a final determination of the agency

on September 22, 2021, when the Social Security Administration Appeals Council denied plaintiff's application for review. This action was commenced on October 27, 2021, and is timely.

In her decision, Administrative Law Judge Koennecke applied the familiar five-step test for determining disability.

At step one, she concluded that plaintiff had not engaged in substantial gainful activity since the alleged onset of his disability, although noting that he does perform ongoing consultative work but not rising to the level of SGA.

At step two, Administrative Law Judge Koennecke concluded that plaintiff suffers from severe impairments that impose more than minimal limitations on his ability to perform work functions, including all mental diagnoses generally characterized as anxiety and depression.

At step three, ALJ Koennecke concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the Commissioner's regulations, specifically considering Listings 12.04, 12.06, and 12.11.

After surveying all of the medical evidence of record, ALJ Koennecke concluded that plaintiff retains the residual functional capacity, notwithstanding his conditions, to perform a full range of work at all exertional levels with

additional mental limitations, nonexertional limitations that I will recite further on in my decision.

Applying that finding at step four, ALJ Koennecke concluded that plaintiff is unable to perform the demands of his past relevant work.

At step five, with the assistance of a vocational expert's testimony, ALJ Koennecke concluded that plaintiff is capable of performing available work in the national economy as a launderer, which is characterized as a medium exertional position with SVP of 2, and therefore found that plaintiff was not disabled.

As you know, the standard of review is extremely deferential. The court must determine whether correct legal principles were applied and substantial evidence supports the determination; substantial evidence being defined as such relevant evidence as a person would find, as a reasonable person would find sufficient to support a conclusion. It is an extremely deferential standard as noted in *Brault v. Social Security Administration Commissioner*, 683 F.3d 443 from the Second Circuit, 2012. As the Circuit noted, this is an exacting standard more so than even the clearly erroneous standard that we are all familiar with, and further noted that under the substantial evidence standard, once an ALJ finds a fact, it can be rejected only if a reasonable fact finder would have to conclude otherwise.

As a backdrop, I note additionally that it is plaintiff's burden at the outset to establish limitations resulting from physical and mental conditions and that includes up through the residual functional capacity stage and step four where, after which the burden of proof shifts to the Commissioner.

In this case, plaintiff makes two basic contentions. First, he argues that the mental components of the RFC is not supported due to an error in evaluating conflicting medical opinions; and secondly, he argues that the physical RFC is not supported and that his foot drop would limit his ability to stand and walk for four out of eight hours a day as required by the exertional component of the RFC, and further argues that the administrative law judge, based upon his testimony at the second hearing, undertook a duty to investigate further and failed to fill the gap created in the record.

Turning first to the second contention regarding the foot drop, I note as an initial matter that there was no claim in either the functional report submitted on behalf of the plaintiff and apparently prepared by his former attorney or at the first hearing that he suffers from any physical impairment. At the first hearing he claimed only that it was depression that caused his inability to work, that's at page 45 of the administrative transcript. He did raise the issue

at the second hearing. There is evidence in the record that plaintiff underwent right foot surgery to lengthen a tendon in 2006, that's at 9F of the administrative transcript. The administrative law judge considered the argument and rejected it, specifically stating her reasoning for doing so at step two, that's at page 14 of the administrative transcript.

At step two, the court -- the administrative law judge must determine whether an impairment is sufficiently severe to significantly limit a claimant's physical and mental ability to do basic work activities. 20 C.F.R. Section 404.1521a. Basic work activities are defined to include the abilities and aptitudes necessary to do most jobs. It is a modest requirement, de minimus, and intended only to screen out the truly weakest of cases.

In this case, it is of course, as I noted, plaintiff's burden to show that he suffers from limitations. The administrative law judge did not outright reject considering the foot drop, despite it not having been brought up. I note that there is no evidence of any records associated with plaintiff's foot drop condition that were proffered by plaintiff or his counsel to the agency and rejected. In fact at the second hearing, the new counsel for the plaintiff stated that there was no objection to the record exhibits.

Instead, the administrative law judge went on to

testify -- or to find that as one factor, the plaintiff did not, when making his application for benefits, claim this, nor did he at the initial hearing when asked why you can't work. There are podiatry records, including of the surgery, but the last one that specifically addresses it is from 2008, and it is the result of an MRI testing that was performed on March 26, 2008, it appears at 544 of the administrative transcript. It was to probe plaintiff's partial foot drop and the impression from that MRI testing was "normal". The administrative -- As the administrative law judge also noted, claimant worked over a decade without -- after he underwent the foot surgery. He reports that he does very well. There are at least two instances where he was observed to have a normal gait by Dr. Carkey.

The plaintiff's activities of daily living greatly undermine the claim that his foot drop would impair him from performing work activities. He goes to the gym three times a week, he walks with friends, he's able to drive without problems, he goes on vacation with his friend, in fact even he testified at most it would cause him to fall maybe two or three times a year, and he did not testify to my recollection of also being unable to stand for periods of time because of his foot drop. He does not use an ambulatory device such as a cane or a brace. And so I don't find any error in the administrative law judge's finding that plaintiff did not

establish at step two that he suffered from a severe impairment, severe physical impairment. I note that, I reviewed Dr. VanHusen's notes at 6F, and other than in the medical history section, there doesn't appear to be any mention of a foot drop. There's no indication of any treatment after 2008.

It is plaintiff's burden to supply medical records. The agency only is responsible to develop a complete medical history of at least 12 months preceding the filing of plaintiff's application; in this case that was October 31, 2019. 20 C.F.R. Section 404.1512. I note also that a plaintiff cannot, cannot support a finding of a diagnosed condition by simply his or her testimony regarding symptoms. *Winchell v. Colvin*, 2014 WL 4263764 from the Northern District of New York, August 28, 2014. I note that while it was not the sole reason for rejecting the foot drop, the administrative law judge also properly considered that it was never included in plaintiff's original claims of why he was disabled. *Stephen A. v. Commissioner of Social Security*, 2021 WL 1099617 from the Western District of New York, March 23, 2021. So I do not find merit in plaintiff's step two argument.

Turning to the first argument, plaintiff challenges the residual functional capacity finding. So an RFC represents finding of the range of tasks a plaintiff is

capable of performing notwithstanding his impairments and it ordinarily means a claimant's maximum ability to perform sustained work activities in an ordinary setting on a regular and continuing basis, meaning eight hours a day for five days a week or an equivalent schedule. And of course an RFC is informed by consideration of all of the relevant medical and other evidence and must be supported by substantial evidence.

In this case, as I indicated, the administrative law judge included a rather restrictive residual functional capacity to address plaintiff's mental health condition. He limited the claimant to understand and follow simple instructions and directions, perform simple tasks independently, maintain attention and concentration for simple tasks, regularly attend to a routine and maintain a schedule, relate to and interact appropriately with all others to the extent necessary to carry out simple tasks and handle simple repetitive work-related stress in that he can make occasional decisions directly related to the performance of simple tasks involving goal-oriented work rather than work involving a production pace.

The medical evidence supports the determination. When considering the administrative law judge's evaluation of the record opinions, I note that the analysis is informed by the new regulations that went into effect for applications filed after March of 2017. Under those regulations, an ALJ

does not defer or give any specific evidentiary weight, including controlling weight, to any medical opinions or prior administrative medical findings, including those from a claimant's medical sources. Instead, an ALJ must consider those opinions using, applying the relevant factors and particularly must consider the factors of supportability and consistency of those medical opinions. Under the regulations, the ALJ must articulate how persuasive he or she found each medical opinion and must explain how he or she considered the supportability and consistency of those medical opinions. The ALJ is also required to consider the other relevant factors set forth in the regulations but is not required to explain how he or she considered those factors. In this case -- and of course, the overarching consideration is that it is for the administrative law judge in the first instance to evaluate and weigh any conflicting reports, to the extent that there are any. *Veino v. Barnhart*, 312 F.3d 578, from the Second Circuit December 10, 2002.

In this case there are several medical opinions in the record. Dr. T. Bruni issued what is actually considered a prior administrative finding but it is subject to the regulations, on July 11, 2020, it appears at pages 76 through 88 of the administrative transcript. The administrative law judge considered that opinion and at page 13 found it to be

"more persuasive". The opinion -- the worksheet of, at Section 1 of the mental residual functional capacity opinion does note moderate limitations in certain areas: The ability to maintain attention and concentration for extended periods; the ability to complete a normal workday and workweek without interruptions from psychologically-based symptoms; and to perform at a consistent pace without an unreasonable number and length of rest periods. However, the mental residual functional capacity finding, the opinion of Dr. Bruni was, despite these limitations, the claimant retains the mental residual functional capacity as follows: Understanding and memory, the claimant is able to understand and remember simple and detailed instructions and procedures; sustained concentration and persistence, the claimant exhibits some difficulty but overall can maintain adequate attention and concentration to complete work like procedures and can sustain a routine. There are also findings with regard to social interaction and adaptation which I don't think are at issue in this case. That is fully consistent with a residual functional capacity.

The opinion of Dr. Jeanne Shapiro, consultative examiner, also supports the residual functional capacity finding. She issued an opinion after a consultative examination of the plaintiff on December 16, 2020. It appears at 513 to 520 of the administrative transcript. As

is relevant in her medical source statement, she finds that mild to moderate limitations sustaining concentration and performing tasks at a consistent pace depending on his level of anxiety; mild to moderate limitations sustaining an ordinary routine and regular attendance at work due to lack of motivation. Dr. Shapiro also in her medical source statement found moderate to marked limitations regulating emotions, controlling behaviors, maintaining well being. The administrative law judge rejected any marked limitations in that area and offered an adequate explanation as to why, but in the areas that we're discussing here, attention and concentration, and attendance at work, the medical source statement is consistent with the residual functional capacity finding.

I note that in the medical source statement that is attached to the report, pages 518 to 520, basically there are no limitations noted in plaintiff's ability to understand, remember and carry out instructions and at most, moderate -- mild to moderate in interacting with public, interacting appropriately with supervisors and interacting with coworkers, and that is all the more consistent with the residual functional capacity finding.

As I indicated, it is -- that opinion is discussed by the administrative law judge at pages 17 and 18 of her opinion. She found it persuasive but did reject, as I

indicated, the moderate to marked limitation, particularly in reliance on the attachment which didn't include limitations to that extent.

The administrative law judge also considered three opinions offered by Dr. Carkey. The first was from July 3, 2020 and it is a more narrative form. It indicates mental status, subdued attitude, appearance and behavior appears at pages 450 to 453. It is also repeated at 482 to 485. It describes mood and affect as dysthymic and restricted but attention and concentration is primarily within normal limits with some issues and orientation, memory, information are all within normal limits; insight and judgment is described as fair. At page 452, Dr. Carkey opines that plaintiff is unable to work based on five-by-five of major depression disorder and of course that is an opinion given on a matter that was reserved to the Commissioner.

On August 6, 2020, Dr. Carkey filled out a mental capacity assessment that appears at 478 to 480 of the record. In understanding, remembering, or applying information, she rates the plaintiff as moderately limited in all of the four sub areas. In concentrating, persistence or maintaining pace, also moderately limited in the six specified areas, those being the two sub areas that are at issue here. Moderate is described, is defined as, "Your functioning in this area independently, appropriately, effectively, and on a

sustained basis is fair." The administrative law judge considered that this was consistent with her RFC finding and I agree. The opinion is at least somewhat supported.

The third one that is given by Dr. Carkey is from March 17, 2021. It appears at 571 to 573 of the administrative transcript. And I have to disagree with, respectfully, plaintiff's counsel. I believe that it is not similar to the earlier opinion from August 6, 2020. It lists several areas in which plaintiff is rated as unable to meet competitive standards, including remember work like procedures, maintain regular attendance and be punctual within customary usually strict tolerances, complete a normal workday and workweek without interruptions from psychologically-based symptoms, respond appropriately to changes in a routine work setting and deal with normal work stress. That term, unable to meet competitive standards, means, is defined to mean, "Your patient cannot satisfactorily perform this activity independently, appropriately, effectively and on a sustained basis in a regular work setting." That opinion does not seem to support the residual functional capacity. It was addressed by the administrative law judge and found to be inconsistent and unsupported.

I note that there are treatment records from the plaintiff, plaintiff's treatment with Dr. Carkey extending

from when she was first consulted in 2019, September of 2019 and extending through to February 17, 2021. They appear at administrative transcript Exhibits 1F, 4F, and 10F. I've reviewed them extremely carefully. And although there are a smattering of treatment notes that reflect some sort of thought or ideation of suicidal tendencies, the vast majority are of plaintiff denying it. They do not reflect any material deterioration in plaintiff's condition that would explain the disparity between the second and third opinions from Dr. Carkey. In fact many of them from August 20, 2020 note that the plaintiff feels better, his attention and concentration is fair. There are references to plaintiff's mood and affect being dysphoric or dysthymic, but for example, September 3, 2020, 567, plaintiff's feeling a little bit better and hopeful, fair judgment, he denies suicidal ideation; September 17, 2020, 566, doing better but not a hundred percent, not ready to work, denies suicidal ideation, otherwise within normal limits with the exception of mood and affect being dysthymic; September 30, 2020 at 565, little less depressed, denies suicidal ideation, mood and affect reported dysthymic, otherwise within normal limits; August 13, 2020 at 564, plaintiff's not ready to work yet, denies suicidal ideation, mood and affect dysthymic, otherwise within normal limits; October -- I'm sorry, September -- November 3, 2020, feeling a little better, still

depressed, good and bad days, within normal limits, almost exclusively denies suicidal ideation and mood and affect described as dysphoric; December 3, 2020, he reports that his sister died and his mother was dying of COVID, he reported walking with friends, no abnormal psychotic thoughts, short-lived suicidal ideation, mood and affect dysthymic; December 22, 2020 still depressed but getting better, thought process less negative, judgment improving, attention and concentration fair, denies suicidal ideation, mood and affect dysthymic, insight fair. The entry from January 6, 2021, feeling a little better, that's at 560, good and bad days, monotone speech, good judgment, good attention and concentration, mood and affect, feeling better but restricted, good insight, walks -- reported walking with friends; January 28, 2021, 559, feeling okay, feeling better, no abnormal psychotic thoughts, judgment good, denies suicidal ideation, mood and affect depressed, good insight; February 17, 2021 at 558, okay, some rough days, try to stay busy, regular exercise, mood improves with activity and interaction, good judgment, no abnormal thoughts, attention and concentration attentive, fluctuating suicidal ideation with depression, insight good, mood and affect dysphoric.

So there isn't any explanation in the treatment notes. The treatment notes support the rejection of the latter more restrictive opinion from Dr. Carkey.

The RFC, in addition to being supported by the medical opinions of Dr. Bruni, Dr. Shapiro, and somewhat by Dr. Carkey, it is also supported by, and the treatment records that I've just recited, plaintiff's robust activities which include cycling, skiing, SCUBA, kayak, going to the gym, walking with friends, taking trips with the family including two vacations to the Adirondacks, socializing and volunteering at a food bank. As the administrative law judge also noted, plaintiff's continuing private practice work is also, also undermines -- or supports I should say, put it the other way around, the RFC, and the lack of any psychiatric hospitalization during the relevant period, none since 2015. So -- and I note when we talk about moderate limitations, moderate limitations are not inconsistent with the ability to perform simple unskilled work. *James R. v. Berryhill*, 2018 WL 8996355 from the Northern District of New York, September 10, 2018. As I said, Dr. Bruni found moderate limitations in his worksheet but concluded in his residual functional capacity opinion the plaintiff could perform unskilled work. Dr. Shapiro only found mild to moderate limitations in the functional areas that we're discussing. And Dr. Carkey similarly finds only moderate limitations in her second opinion. Those opinions all support the residual functional capacity finding. The *James R.* case I cited to already and *Shari L. v. Kijakazi*, 2022 WL 561563 from the

Northern District of New York, February 24, 2020.

The plaintiff argues that a moderate to marked limitation in sustaining routine should result in the finding that plaintiff would be absent two or more times per month. Similar arguments have been rejected by the courts including in *Becky Sue H. v. Commissioner of Social Security*, 2021 WL 7367082 from the Northern District of New York, December 15, 2021. As the court noted in *Lowry v. Commissioner of Social Security*, 2017 WL 1290685 from the Northern District of New York, March 16, 2017, this implicates the ability to concentrate and persist and a moderate limitation in those areas, once again, does not preclude unskilled work.

Plaintiff argues that because those opinions were accepted, all of the limitations set forth in those opinions, including specifically Dr. Shapiro, should have been included and taken into account in the RFC and of course the mere fact that an ALJ chooses to credit an opinion does not require the ALJ to accept each and every limitation set forth in that opinion.

In sum, I think that the RFC is adequately supported by substantial evidence. Plaintiff's challenge to the evaluation of the conflicting medical opinions, to the extent they do conflict, represents nothing more than an invitation for the court to reweigh conflicting evidence, something that is of course entrusted to the Commissioner.

So in conclusion, I find that the correct legal principles were applied, substantial evidence supports the resulting determination. I will therefore grant judgment on the pleadings to the defendant and order dismissal of plaintiff's complaint.

Thank you both, I hope you have a good afternoon.

MR. GOLDSTEIN: Have a good afternoon.

MS. OELTJEN: Thank you.

(Proceedings Adjourned, 3:19 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 27th day of October, 2022.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter